DOCUMENT RESUME

ED 083 748 EA 005 604

AUTHOR	Robbins, Jerry H.
TITLE	Privileged Communications by Psychologists, Social Workers, and Drug and Alcohol Specialists.
SPONS AGENCY	Governor's Office of Education and Training, Jackson, Miss.
PUB DATE	Nov 73
NOTE	30p.
EDRS PRICE	MF-$0.65 HC-$3.29
DESCRIPTORS	*Communication (Thought Transfer); *Confidentiality; Counselors; Drug Abuse; Drug Education; Ethical Values; *Ethics; Models; Psychologists; Social Workers; Specialists; *State Laws; *State Legislation
IDENTIFIERS	*Privileged Communication

ABSTRACT

Under the laws of the United States, privileged communications are strictly limited to a few well-defined categories, such as communications between attorney and client, clergyman and penitent, and physician and patient. Certain official documents are recognized as privileged, and a privilege is accorded law enforcement officers to decline to reveal confidential sources of information. This paper discusses the status of legislation on privileged communication according to (1) Mississippi statutory law, (2) statutory law in five other States, (3) major cases that have been in Mississippi courts, (4) the status of the case law on the subject elsewhere, (5) model legislation that has been proposed or recommendations for legislative action proposed by various agencies, and provides (6) recommendations developed on the basis of the material presented in the paper. (Author/MLF)

ERIC

ED 083748

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

PRIVILEGED COMMUNICATIONS BY PSYCHOLOGISTS, SOCIAL WORKERS, AND DRUG AND ALCOHOL SPECIALISTS

by

Jerry H. Robbins, Ed.D.

This paper is one of a series sponsored by the Governor's Office of Education and Training. Special thanks must go to Governor William Waller and Dr. Milton Baxter, Executive Director of the Governor's Office of Education and Training, for providing the support for the research and writing that have gone into these papers.

Each of the papers in this series is designed to speak to the following questions: (1) What is the statutory law in Mississippi on the subject, if any? (2) What is the statutory law in approximately five other states on the same subject? (3) What major cases, if any, have been in courts in Mississippi? (4) In very general terms, what is the status of the case law on the subject elsewhere? (5) What model legislation, if any, has been proposed or what recommendations for legislative action, if any, have been proposed by various agencies? (6) What recommendations seem to follow from the information presented in the answers to questions 1-5?

The author wishes to acknowledge the assistance in developing this paper of Dr. Dudley Sykes, Associate Professor of Guidance and Educational Psychology, and George Lyles, student in the School of Law, both of The University of Mississippi.

University, Mississippi
November, 1973

EA 005 604

FILMED FROM BEST AVAILABLE COPY

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

PRIVILEGED COMMUNICATIONS BY PSYCHOLOGISTS, SOCIAL WORKERS, AND DRUG AND ALCOHOL SPECIALISTS

by

Jerry H. Robbins, Ed.D.

It is generally accepted that the privileged communications are those made by persons holding a certain confidential relation. In particular, these are those of physician and patient, attorney and client, clergyman or priest and penitent, husband and wife, government and informer, and sometimes a few others. The tendency in legal circles is not to extend the classes to which the privilege from disclosure is granted, but to restrict that privilege.

A privileged-communication statute affords protection only to those relationships specifically named therein. A court may not prescribe such privilege in behalf of any particular class, but the legislature may do so. The very fact that testimonial privileges are based on specified confidential relations is proof that they do not extend to all such relations.(1)

Under the laws of the United States, privileged communications are strictly limited to a few well-defined categories, such as communications between attorney and client, clergyman and penitent, and physician and patient. Certain official documents are recognized as privileged, and a privilege is accorded law-enforcement officers to decline to reveal confidential sources of information. (2)

As of 1971, of the fifty states and the District of Columbia, twelve did not have a physician-patient privilege. Mississippi has such a privilege. Five states, not including Mississippi, had a separate psychiatrist privilege; four of these did not have a physician privilege. Two states, California and Maryland, had a privilege encompassing both psychologists and psychiatrists. All but fifteen states and the District of Columbia had a psychologist privilege. Mississippi has such a privilege. New York and, quite recently, Michigan, established a privilege for certain certified social workers. Colorado, Michigan, New Jersey, and Oregon provided a privilege for marriage counselors. (3)

I. PSYCHOLOGISTS

Statutory Law

Mississippi. The laws of Mississippi define a "psychologist" as follows:

> . . .a person who represents himself as such by holding himself out to the public by any title or description of services which incorporates the words, "psychological," "psychologist," "psychology," or a person who describes himself as above, and under such title or description offers to render or renders services involving the application of principles, methods, and procedures of the science and profession of psychology to persons for compensation or other personal gain. (4)

The "practice of psychology" is defined as follows:

> . . .the application of principles of learning, motivation, perception, thinking, and emotional relationships to problems of personnel evaluation, group relations, and behavior adjustment by persons trained in psychology. The application of said principles includes, but is not restricted to, counseling, guidance, and behavior modification with persons or groups; with adjustment problems in the areas of work, family, school, and personal

> relationships; human engineering; personnel selection; measuring and testing personality, intelligence, aptitude, emotions, public opinion, attitudes, and skills; and doing research on problems relating to human behavior. (5)

Communication is privileged by the following section:

> A psychologist shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall a psychologist's secretary, stenographer or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity. (6)

Arkansas. In Arkansas privilege is extended to psychologists in the following way:

> For the purpose of this Act, the confidential relations and communications between licensed psychologist or psychological examiner and client are placed upon the same basis as those provided by law between attorney and client; and nothing in this Act shall be construed to require any such privileged communication to be disclosed. (7)

California. In California, "psychotherapist" is defined to include psychiatrists; psychologists; clinical social workers; school psychologists; and licensed marriage, family and child counselors. Privilege is extended to these in the following way:

> As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the courseof that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation. . .or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose . . .for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship. (8)

Florida. In Florida privilege is extended to psychologists as follows:

> (1) A person who, for the purposes of securing psychological diagnostic assessment or counseling, consults a psychologist licensed to practice psychology in this state, except as hereinafter provided, in civil and criminal cases, in proceedings preliminary thereto, and in legislative and administrative proceedings, has a privilege to refuse to disclose and to prevent a witness from disclosing communications between himself and the psychologist or between members of his family and the psychologist or records relating to his diagnostic psychological testing or counseling.
>
> (2) There shall be no privilege for any relevant communications under this section:
> (a) If a judge finds that the person evaluated by a psychologist, after having been informed that the communications would not be privileged, has made communications to a psychologist in the course of a psychological examination ordered by the court. However, such communications shall be admissable only on issues involving a person's mental or psychological condition;
> (b) In a criminal or civil proceedings in which the person introduces his mental or psychological condition as an element of his claim or defense or, after his death, when said condition is introduced by any party claiming or defending through or as his beneficiary. (9)

Indiana. Privilege is extended to psychologists in Indiana under the following statute:

> No psychologist certified under the provisions of this act shall disclose any information he may have acquired from persons with whom he has dealt in his professional capacity, except under the following circumstances: (1) in trials for homicide where the disclosure related directly to the fact or immediate circumstances of said homicide; (2) in proceedings the purpose of which is to determine mental competency, or in which a defense of mental incompetency is raised; (3) in actions, civil or criminal, against a psychologist for malpractice; (4) upon an issue as to the validity of a document as a will of a client; and (5) with the expressed consent of the client or subject, or in the case of his death or disability of his legal representative. (10)

Montana. The confidential relationship between

psychologist and client is defined in Montana in this way:

> The confidential relations and communications between a psychologist and his client shall be placed on the same basis as provided by law for those between an attorney and his client. Nothing in this act or any other shall be construed to require such privileged communications to be disclosed. (11)

New York. In New York a psychologist has the right of privileged communication under the following law:

> The confidential relations and communications between a psychologist registered under the provisions of article one hundred fifty-three of the education law and his client are placed on the same basis as those provided by law between attorney and client, and nothing in such article shall beconstrued to require any such privileged communications to be disclosed. (12)

Tennessee. The confidential relations between psychologist and client are defined in Tennessee in a similar way.

> For the purpose of this chapter, the confidential relations and communications between licensed psychologist or psychological examiner and client are placed upon the same basis as those provided by law between attorney and client and nothing in this chapter shall be construed to require any such privileged communication to be disclosed. (13)

Case Law

No significant cases involving privileged communications between psychologists and their clients were found, either in Mississippi or elsewhere. This may be due to the fact that this privilege did not exist in common law, and hence is strictly statutory.

II. SOCIAL WORKERS

Very few states have enacted laws extending the right of

privileged communication to social workers. Apparently there is no statutory basis for privileged communication between social workers and clients in Mississippi.

Statutory Law

California. As noted in the previous section, California nas extended the right of privileged communication to "psychotherapists," where a"psychotherapist" is defined to include clinical social workers and licensed marriage, family and child counselors. However, in order to be licensed as a clinical social worker or as a marriage, family and child counselor, a person must be affiliated with a licensed clinical social workers corporation. The California law carefully defines how such a corporation is registered. (14),(15)

Michigan. Effective July 1, 1973, Michigan provided for the registration and certification of social workes, and extended privileged communication to such social workers. In Michigan,

> "Social work" means the professional activity of helping individuals, groups or communities to enhance or restore their capacity for social functioning and creating conditions favorable to this goal. Social work practice consists of the professional application of social work values, principles and techniques to 1 or more of the following ends: helping people obtain tangible services; counseling with individuals, families and groups; helping communities or groups provide or improve social and health services; and participating in relevant legislative processes. The practice of social work requires knowledge of human development and behavior; of social, economic and cultural institutions; and of the interaction of all these factors. (16)

The Michigan law adds:

> After April 1, 1974, an individual shall not represent himself as a certified social worker, social worker or social work technician unless he is certified and registered under this act. (17)

Privileged communication is extended to social workers in the following way:

> (1) A person registered as a certified social worker, social worker or social work technician or an employee or officer of an agency for whom the certified social worker, social worker or social work technician is employed shall not be required to disclose a communication or any portion of a communication made by his client to him or his advice given thereon in the course of his professional employment.
>
> (2) A communication between a certified social worker, social worker or social worker technician, or an agency of which the certified social worker, social worker or social work technician is an agent and a person counseled is confidential. This privilege is not subject to waiver except when the disclosure is part of the required supervisory process within the agency for which the certified social worker, social worker or social work technician is employed; or except where so waived by the client or a person authorized to act in his behalf. The certified social worker, social worker or social work technician shall submit to the appropriate case a written evaluation of the prospects or prognosis of a particular case without divulging facts or revealing confidential disclsoures when requested by a court for a court action. An attorney representing a client who is subject of such an evaluation shall have the right to receive a copy of the report. Where required for the exercise of a public purpose by a legislative committee the certified social worker, social worker, social work technician or agency representative may make available such statistical and program information without violating the confidentiality of the client. (18)

New York. A person duly registered as a certified social worker under the laws of the State of New York

> shall not be required to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person working for the same employer as the certified social worker or for the certified social worker be allowed to disclose any such communication or advice given thereon; except
>
> 1. that a certified social worker may disclose such information as the client may authorize;

> 2. that a certified social worker shall not be required to treat as confidential a communication by a client which reveals the contemplation of a crime or harmful act;
>
> 3. where the client is a child under the age of sixteen and the information acquired by the certified social worker indicates that the client has been the victim or subject of a crime, the certified social worker may be required to testify full in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry;
>
> 4. where the client waives the privilege by bringing charges against the certified social worker pursuant to section seventy-seven hundred seven of the education law where such charges involve confidential social worker. (19)

Marriage counselors. A few states license marriage counselors, of which New Jersey is an example. In such instances, it may be argued that social workers or at least certain types of social workers would or may fall under the provisions of the legislation. In New Jersey confidential communications between the marriage counselor and the client are defined as follows:

> Any communication between a marriage counselor and the person or persons counseled shall be confidential and its secrecy preserved. This privilege shall not be subject to waiver, except where the marriage counselor is a party defendant to a civil, criminal or disciplinary action arising from such counseling, in which case, the waiver shall be limited to that action. (20)

Restricted privilege. According to a 1965 summary of the legal status of social workers, it was found that

> A few states declare that public officers cannot be forced to testify. (21) Certain social workers, such as juvenile, probation or parole officers conceivably come within the scope of such a privilege.
>
> Also many state legislatures, either in conjunction with federal grant-in-aid programs or on their own initiative, have enacted statutes granting a privilege to participants in particular welfare programs. Information may be privileged if it was given to adoption, (22) health and safety agencies, (23) mental institutions, (24) maternity hospitals, (25) or departments of unemployment compensation; (26) or if it appears in drug addiction, (27)

> alcoholism, (28) venereal disease, (29) eye disease, (30) probation and parole, (31) or child welfare records; (32) or in the records of social welfare, (33) vocational rehabilitation, (34) juvenile court, (35) probation and parole, (36) or domestic relations proceedings, (37),(38)

In addition to these examples of restricted communications, the Social Security Act makes mandatory, on all states receiving federal funds as grants-in-aid, the inclusion of a confidentiality clause in their own enabling statutes. Thus section 2 reads, in part: "A State plan for old-age assistance must. . .provide safeguards which restrict the use of disclosure of information concerning applicants and recipients to purposes directly connected with the administration of old-age assistance . . . ."(39) Similar provisions apply to aid to dependent children, aid to the blind, the permanently and totally disabled, etc. (40)

Case Law

There appears to be no case law directly affecting privileged communication of social workers or those in related fields in Mississippi.

However, in other jurisdictions, there have been a few cases. Only as recently as 1930 does there appear what seems to be the earliest case specifically ruling on the issue of privileged communication as related to the social work profession. (41) In this case a social agency asserted the privilege as a defense against producing case records in court. The court sustained the privilege. But in a subsequent case, occuring shortly thereafter, in the same court, with another justice presiding, the defense was struck down. (42)

Thereafter, courts in Texas, Pennsylvania, Ohio, New York, Indiana, the District of Columbia, California, and Wisconsin held that there was no social worker privilege of confidential communication in the absence of a statute expressly granting such a privilege. (43)

By 1965, only three cases had granted protection to confidential communications between a social worker and his client in the absence of a statutory provision, one of which was a Canadian case. (44)

One recent case was in Wisconsin. The Supreme Court of that state upheld a lower court which had found the defendant guilty of indecent behavior with a child and of having sexual intercourse with a child. In ruling on this matter, the court held that "public policy is not so definitely compelling or clear or the area so limited as to compel it to grant testimonial confidentiality by court decision to social workers." In particular, the court found that where no action for divorce or legal separation was pending, "inculpatory statements" made by the defendant to a social worker at a mental health clinic to which the defendant and his wife went on a self-referral basis were not inadmissable. (45)

III. DRUG AND ALCOHOL SPECIALISTS

The employment of drug and alcohol specialists in the public schools is still a relatively uncommon matter. However, the fact that Mississippi has now provided for at least one such person in each school district brings close to home the rights,

if any, of such persons to enjoy privileged communication with students and others.

Statutory Law

Mississippi. The recently-enacted law establishing a drug education program in the public schools of Mississippi includes the following provisions:

> Section 1. The purposes of this act are: (1) to provide for establishment of a drug education program in the public schools of this state, (2) to provide a method of financing said program, and (3) to provide for the training of drug education specialists.
>
> Section 2. The State Board of Education is hereby authorized to develop a program of drug education to be used in every school district of the state which shall be directed toward students, in both public and nonpublic schools, adults and community organizations.
>
> Section 3. Beginning with school year 1973-74, . . .no funds shall be disbursed to any school district under the provisions of this section until such school district shall have employed a qualified drug education specialist. It is the express intent of this act that these drug education specialists shall not be utilized in any other capacity upon return to the school system.
>
> . . . . . .
>
> Section 5 (c) The State Department of Education and the state agency established under Section 409 of Public Law 92-255 shall have the joint responsibility of developing and administering a program of training for the drug education specialists. This training program shall include appropriate participation by authorities in the fields of education, sociology, medicine, pharmacy, psychology, psychiatry, law and law enforcement. No drug education specialist may be employed who has not completed the training proscribed in this section and who does not have at least an "A" teacher's certificate and one (1) year of teaching experience. . . .(46)

Connecticut. In Connecticut the laws define a "professional employee" as

> a person employed by a school who (A) holds a certificate from the state board of education, (B) is a member of a faculty where certification is not required, (C) is an administration officer of a school, or (D) is a registered nurse employed by or assigned to a school. (47)

A "professional communication" is

> any communication made privately and in confidence by a student to a professional employee of his school in the course of the latter's employment. (48)

The Connecticut law further provides that

> Any such professional employee shallnot be required to disclose anyinformation acquired through a professional communication with a student, when such information concerns alcohol or drug abuse or any alcoholic or drug problem of such student but if such employee obtains physical evidence from such student indicating that a crime has been or is being committed by such student, such employee shall be required to turn such evidence over to school administrators or law enforcement officials, provided in no such case shall such employee be required to disclose the name of the student from whom he obtained such evidence and such employee shall be immune from arrest and prosecution for the possession of such evidence obtained from such student.
>
> Any such professional employee who, in good faith, discloses or does not disclose, such professional communication, shall be immune from any liability, civil or criminal, which might otherwise be incurred or imposed, and shall have the same immunity with respect to any judicial proceeding which results from such disclosure. (49)

Maryland. In 1971 the state of Maryland provided by law that a program of drug education shall be instituted in the public schools as soon as practicable by instructors who have been trained in the field of drug education. In addition, Maryland provided that

> (a) Whenever a student shall seek information for the purpose of overcoming any form of drug abuse, as defined in §2(d) of Article 43B of this Code, from any teacher, counselor, principal or other professional educator employed by an educational institution approved under

> the provisions of §§ 11 and 12 of this article, no statement, whether oral or written, made by the student and no observation or conclusion derived shall be admissible against the student in any proceeding.
>
> (b) The disclosure of any reports, statements, observations, conclusions and other information which has been assembled or procured by the educator through this contact, shall not be required by any rule, regulation or order of any kind. (50)

Michigan. A 1972 Amendment to the Michigan laws extends privileged communication to "professional persons" engaged in "character building" in the public schools. As such, this would probably extend privileged communication to persons such as drug and alcohol specialists in the schools. However, in addition, it would seem to include teachers, administrators, and others as well.

The Michigan law reads:

> No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution, including any clerical worker of such schools and institutions, who maintains records of students' behavior or who has records in his custody, or who receives in confidence communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him from the records of such communications; nor to produce records or transcripts thereof, except that testimony may be given, with the consent of the person so confiding or to whom the records relate, if the person is 18 years of age or over, or, if the person is a minor, with the consent of his or her parent or legal guardian. (51)

Counselors. In the course of their work, counselors often come into contact with drug and alcohol problems. In addition, a number of Mississippi school districts have hired persons certified as counselors as drug and alcohol specialists. As a result, it was decided to investigate the statutes extending the

right of privileged communication to counselors.

1. Connecticut and Michigan, as noted above, have extended the right of privileged communication to professional employees, including counselors.

2. Indiana provides that

> Any counselor duly appointed or designated a counselor for the school system by its proper officers and for the purpose of counseling pupils in such school system shall be immune from disclosing any privileged or confidential communication made to such counselor as such by any pupil herein referred to. Such matters so communicated shall be privileged and protected against disclosure. (52)

3. North Dakota provides that

> For the purpose of counseling in a school system, any elementary or secondary school counselor possessing a valid North Dakota guidance credential from the department of public instruction, and who has been duly appointed a counselor for a school system by its proper authority, shall be legally immune from disclosing any privileged or confidential communication made to such counselor in a counseling interview. Such communication shall be disclosed when requested by the counselee. (53)

4. Pennsylvania provides that

> No guidance counselor, school nurse, or school psychologist in the public schools or in the private or parochial schools or other educational institutions providing elementary or secondary education, including any clerical worker of such schools and institutions, who, while in the course of his professional duties for a guidance counselor, school nurse or school psychologist, has acquired information from a student in confidence shall be compelled or allowed without the consent of the student, if the student is eighteen (18) years of age or over, or if the student is under the age of eighteen (18) years, without the consent of his or her parent or legal guardian, to disclose that information in any legal proceeding, civil or criminal, trial, investigation before any grand, traverse or petit jury, any officer thereof, before the General Assembly or any committee thereof, or before any commission, department or bureau of this Commonwealth, or municipal body, officer or committee thereof. Notwithstanding the confidentiality provision of this section, no such person shall be excused or prevented from complying with the act. . .relating to gross physical neglect of, or injury to children under eighteen years of age;

> requiring reports in such cases by examining physicians or heads of institutions to county public child welfare agencies; . . . .(54)

Case Law

There appear to be no significant cases involving the right of privileged communications between drug and alcohol specialists and students. In the absence of a statutory privilege, school personnel can generally be subpoenaed and required to testify in court regarding communications with students. In Connecticut and Michigan this right has apparently been extended by statute to all or almost all professional personnel of the school. In Indiana, North Dakota, and Pennsylvania privileged communication apparently exists for school counselors. In a few other instances, privileged communication would exist for school psychologists, school nurses, and school social workers that would come into contact with drug and alcohol problems.

In other states, apparently the only major defenses a drug and alcohol specialist would have in not testifying against a student would be under (A) the hearsay rule, where, generally, hearsay is defined as an out-of-court statement introduced in court to prove the truth of the facts asserted therein. Depending on the actual content of each individual conversation, much of the communication between a student and counselor could conceivably fall within this definition of hearsay. Nevertheless, the testimony may still be admissable under one of the numerous exceptions to the hearsay rule. (B) An adherence to ethical standards might be a defense for not testifying.

To avoid breaching the students' confidence, the school personnel may request that the judge not require them to violate the confidentiality of the relationship. The personnel may refuse to testify, although this would most likely subject them to contempt charges. Or, the personnel could commit perjury, either by stating that the student had told him nothing or by testifying falsely as to statements made by the student.

IV. PROPOSED LEGISLATION

In recent months, a number of attempts have been made to extend the right of privileged communication to school personnel. Among the attempts that have been made, according to the Education Commission of the States, are these:

1. South Dakota--extend to certified counselors
2. New York--student advisors prohibited from disclosing information about drugs; confidential communications between pupils, parents, and designated school personnel
3. Maine--extend to counselors
4. Texas--counselor-student communications which tend to incriminate student; counselor (any certified teacher or administrator) not required to testify in criminal actions if such would tend to incriminate student; privileged communications between counselors and student, with clause for compulsion at judge's request and discretion.
5. Arizona--counselor-student communications cannot be used in civil action without the consent of the student.
6. West Virginia--conversations between pupils and counselors are privileged.
7. Colorado--privileged communications by counselors regarding individual or group counseling.

8. Wisconsin--extend privileged communication to certified counselors or to school social worker or other person designated by the Board to provide counseling.

9. Florida--extend privilege to counselors, school psychologists and visiting teachers.

10. Iowa--extend to counselors the same privilege as to attorney.

V. MODEL LEGISLATION

Psychologists

The author of a scholarly article in the Yale Law Journal held that

> A model privileged communications act should be limited to licensed psychiatrists, psychologists, and social workers. It should also specifically denounce the future crime and eavesdropper exceptions, while including whatever exceptions are thought necessary to keep it from being used as an engine of injustice. (55)

Inasmuch as the present law extending privileged communication to psychologists in Mississippi appears to be as advantageous to psychologists as any in the country, it may be considered a model in itself.

Social Workers

In discussing the various possibilities that could be considered in drafting legislation extending the right of privileged communication, one author of a thorough study of the matter raised these questions:

1. Who is a social worker? Is it based on the professional training and experience of the individual, or is it based on the function which a social worker performs?

2. Whose interests are paramount if the client wishes to waive his privilege, but the social worker or agency does not? Should parents be precluded from acquiring information about their children?

3. When should the privilege exist? In both civil and criminal prosecutions? In open or closed hearings?

4. What information should be privileged? All information about a client, including his identity, records, information gathered from his family and close friends, and the impressions and conclusions arrived at by the social worker?

5. What constitutes waiver of the privilege by a client? Communications made in the presence of a third party? Statements made during a group therapy session? Intra-agency disclosures? Inter-agency disclosures? (56)

He concluded:

> If a legislature should decide to protect the social worker-client relationship, there are two basic types of statutes which it can enact: (1) a general or discretionary statute which grants a privilege in broad terms and confers a great degree of discretion upon the trial judge to determine the scope and limitations of the privilege, or (2) a statute which specifically spells out whose privilege, when privileged, etc., and limits the judge's discretion to deciding whether these standards have been met. . . .
>
> The legislature should first determine when confidentiality is necessary to the full and satisfactory maintenance of the relationship. . . .[and] next,. . .to determine when the injury to the relationship outweighs society's interest in the correct disposal of litigation. (57)

Drug and Alcohol Specialists

One author, in making a case for extending the right of privileged communications to school counselors, makes a number of points under a heading "Considerations in Drafting a Statute" that are applicable to drug and alcohol specialists. (58)

His first point is that the groups of people to be involved must be well-defined. Students are generally members of a readily identifiable group; therefore, the problem remains one of defining counselors. One process is that of identifying those persons who have been duly authorized or appointed as

counselors in a school system. Another is to restrict it to persons officially certified by the state as counselors. (59)

A second point has to do with the control of the privilege. The role and responsibility of the counselor is obvious; that of the student is less so. Although he points out that the logical person to control the waiver is the student, he also mentions that there is a role for the parent or guardian to play in the possible waiver of privilege. (60)

A third point has to do with the protected communications. Should all communications be so protected, or could educational and vocational problems be omitted? Should communications made in the presence of third parties be protected? Should communications concerning anticipated criminal actions be so protected? (61)

Should, he asks in a fourth point, a distinction be made between civil and criminal proceedings? (62)

General

Oneinteresting approach to model legislation is to avoid the controversy as to which types of professional positions are entitled to privileged communications and to deal instead, with the nature of the communication itself, irrespective to whom the communication is made. The following proposed law follows this line of reasoning:

Proposed Statute for Privileged Communications

§1. Public Policy. The public policy with respect to

this Act is declared to be the preservation of certain privileged communications as defined in §2 insofar as preservation of the privilege will not cause relatively more harm to the administration of justice than disclosure will cause to the party and/or the relationship by or in which the communication was made.

§2. Privileged Communications. In order for any communication to be privileged it must satisfy the following conditions:

1. It must be made with the expectation that it will not be disclosed; and,

2. Confidentiality must be an essential element of the relationship in which the communication is made; and,

3. The communication must be necessary in order for the person making it to derive benefit from the relationship.

§3. Aid or Treatment. For the purposes of this Act:

1. The benefit to be derived by the person making the communication must constitute aid or treatment which he reasonably believes that the person hearing the communication is qualified, by reason of special skill, training, or knowledge, to give; and,

2. The communication must be necessary in order for the person hearing the communication to render the aid or treatment fully and effectively.

§4. Definitions. For the purposes of the Act:

1. A Claimant is any person authorized under the following section to claim the privilege.

2. The person hearing the communication is the person to

whom the communication is made.

§5. Who May Claim. The privilege may be claimed by:

1. The person making the communication;

2. The person hearing the communication, unless he is instructed otherwise by the person who made the communication or his personal representative or guardian or unless there is neither a person who made the communication nor his personal representative in existence;

3. A guardian or conservator of the person who made the communication;

4. The personal representative of the person who made the communication if that person is dead,

5. Third parties present when the communication was made with the knowledge of the person making the communication and whose presence was reasonably believed to be necessary either to the person hearing the communication or to the person making the communication;

6. Third parties present when the communication was made without the knowledge of the person making the communication;

7. Third parties with access to the records of the communication.

§6. Ruling on Claim. 1. When a claim of privilege is made, and the provisions of §2 are met, the adverse party must show that there are reasonable grounds to believe that the information which would be excluded by allowing the claim of privilege is relevant to the particular litigation.

2. When the provisions of subsection (1) of this section are met, the judge shall hear the claimant, as provided in §7, and he shall decide whether the claim of privilege should be granted in spite of the showing of the adverse party pursuant to subsection (1) of this section.

3. In determining whether the claim of privilege should be granted pursuant to subsection (2) of this section, the relative harm to the proper administration of justice if the claim is allowed, compared to the harm to the relationship involved in the particular litigation if the claim is disallowed, should be weighed by the trial judge.

4. In evaluating the harm to the relationship involved in the litigation, the judge should consider only the effect on the particular relationship involved. The judge may not consider the effect of allowance or disallowance of the claim on:

a. other relationships of a similar type.

b. whether a claim of privilege has been allowed or disallowed in cases involving similar relationships; or,

c. whether the relationship exists at the time of the litigation.

§7. Withdrawal to Chambers; Record. 1. When the provisions of §6(1) are met, the judge shall withdraw to his chambers with the person claiming the privilege and any other person whose presence the claimant desires. If the claimant is not the person who made the communication, then the person who made the communication should also be present.

2. A transcript of the proceedings in the judge's chambers and of his ruling on the privilege and reasons for the ruling shall be made. In the event that the judge determines that the privilege is warranted, he and all others present will treat any matter disclosed as a privileged communication and the transcript shall be impounded and shall be available only to a higher court in the event that the ruling is appealed. In the event that the ruling is made against allowing the privilege, the transcript shall become part of and be included in the record of the litigation.

§8. Standard on Appeal. The standard of review of the trial judge's decision with respect to the allowance or disallowance of the privilege under the provisions of this Act shall be whether the judge's decision was clearly erroneous.

VI. RECOMMENDATIONS

Based on the material presented in this paper, it is recommended that:

1. There be no change in the status of privileged communications for psychologists, unless it be to include such terms as court-ordered tests of mental competency. The recommendation for no change is based on the fact that psychologists in Mississippi enjoy a high degree of privileged communication--more than psychologists in most states.

2. An act, similar to that which has recently gone into effect in Michigan (64) and which was presented earlier in this paper, be adopted to extend the right of privileged communication to social workers. To implement this act, it would be

necessary to designate some state agency, such as the state welfare department, as the agency to certify and register social workers. This recommendation is based on the fact that social workers in Mississippi, as in most states, do not have the right of privileged communication and that they are not likely to have this privilege extended by the courts.

3. Drug and alcohol specialists, along with other school personnel, be extended rights of privileged communication with their clients through enactment of a law, similar to the one in Connecticut (65) presented earlier ir this paper. Alternatively, some features of the Michigan law (66) could be included to protect counselors, teachers, administrators, and other professional school personnel under privileged communication concerning matters other than drugs and alcohol.

4. As an alternative to all of the recommendations given above, the proposed statute for privileged communications, presented in the previous section, be considered. An advantage would be that it would cover, at least in part, a variety of professional personnel, including physicians, nurses, psychologists, social workers, juvenile officers, teachers and other school personnel, accountants and other financial officers, journalists, etc. The disadvantage is that each case would be considered on its merits, with a judge deciding whether or not a communication was privileged. The content of the communication would have to be revealed to a small number of people in order for a determination

to be made as to whether or not it should be considered as a privileged communication. This procedure would also likely lead to a number of appeals based on alleged judicial error.

(1) 97 Corpus Juris Secundum, Witnesses § 254 (1957) and (Supp. 1973).

(2) Ibid.

(3) Maine Law Review 443 (1971).

(4) Mississippi Code 1942 Annotated, § 8877-102 (Supp. 1972).

(5) Ibid.

(6) Ibid., Section 8877-116.

(7) Arkansas Statutes Annotated, § 72-1516 (1957).

(8) California Evidence Code, § 1012 (West Supp. 1973).

(9) Florida Statutes Annotated, Chap. 490 § 490.32 (West Supp. 1973).

(10) Indiana Statutes Annotated, § 63-3617 (Burns Supp. 1972).

(11) Revised Codes of Montana, § 66-3212 (Supp. 1971).

(12) New York Civ. Prac. Law, §4507 (McKinney Supp. 1973).

(13) Tennessee Code Annotated, § 63-1117 (1955).

(14) California Business and Professions Code, § 9070 et seq. (West Supp. 1973)

(15) California Evidence Code, Ibid.

(16) Michigan Compiled Laws, § 338.1751 (Supp. 1973).

(17) Ibid., § 338.1752.

(18) Ibid., § 338.1764.

(19) New York Civ. Prac. Law, § 4508 (McKinney Supp. 1973).

(20) New Jersey Statutes Annotated, § 8B:29 (Supp. 1973).

(21) These included, at the time, California, Colorado, and Oregon. The extension of the privilege to "public officers" can be interpreted as covering all the branches of the government.

(22) These included, at the time, Florida, Hawaii, Maine, South Carolina, and Wyoming.

(23) These included, at the time, Alaska, Maryland, and Wisconsin.

(24) These included, at the time, Alaska, Maine, Maryland, North Carolina, and South Carolina.

(25) At the time, Iowa.

(26) These included, at the time, Florida, Hawaii, Illinois, Nevada, North Carolina, and Oklahoma.

(27) These included, at the time, Florida, Maine, and Mississippi.

(28) These included, at the time, Kansas and Mississippi.

(29) These included, at the time, Alabama and Maine.

(30) At the time, Illinois.

(31) These included, at the time, Georgia, Indiana, Mississippi, Missouri, Nevada, North Carolina, South Carolina, and Wyoming.

(32) These included, at the time, Alabama, Iowa, Missouri, North Carolina, and South Carolina.

(33) These included, at the time, Maine, New York, and Oregon.

(34) These included, at the time, Minnesota, and South Carolina.

(35) These included, at the time, Connecticut, Georgia, Indiana, Oklahoma, Oregon, and Virginia.

(36) These included, at the time, Florida, Mississippi, and Missouri.

(37) These included, at the time, Oklahoma and Oregon.

(38) "The Social Worker-Client Relationship and Privileged Communication," 1965 Washington University Law Quarterly, 362.

(39) Social Security Act § 2(a)(8), 53 Stat. 1360 (1939), 42 U.S.C. § 302 (a)(8) (1958).

(40) Anthony F. LoGatto, "Privileged Communication and the Social Worker," 8 The Catholic Lawyer 5 (1962), pp. 7-8.

(41) Perlman v Perlman, Index No. 5105, N.Y. Sup. Ct., Bronx County, June 30, 1930.

(42) In the Matter of the City of New York (Sup. Ct., Bronx County, 91 N.Y.L.J., February 1, 1934, p. 529, col. 7

(43) 97 Corpus Juris Secundum, Ibid.

(44) Simrin v Simrin, 43 Cal. Rpte. 376 (Dist. Ct. App. 1965); People v Quinn, 61 Cal. 2d 551, 39 Cal. Rptr. 393, 393P. 2d 705 (1964); Re Kryschuk & Zulynik, 14 D.L.R. 2d 676 (Sask. Magis. Ct. 1958).

(45) State v Driscoll, 193 N.W. 2d 851 (1972).

(46) Mississippi General Acts, Chapter 453 (1973).

(47) Connecticut General Statutes Annotated, §10-154a (Supp. 1973).

(48) Ibid.

(49) Ibid.

(50) Maryland Code Annotated, Art, 77 § 85A (Cum, Supp. 1972).

(51) Michigan Compiled Laws, §600.2165 (Supp. 1973).

(52) Indiana Annotated Statutes, §28-4537 (Burns 1970).

(53) North Dakota Cent. Code, § 31-01-06.1 (Supp. 1969).

(54) Pennsylvania Statutes Annotated, §13-1319 (Purdon's Supp. 1973).

(55) "Functional Overlap Between the Lawyer and Other Professions: Its Implications for the Privileged Communication Doctrine," 71 Yale Law Journal 1226 (1962), p. 1260.

(56) "The Social Worker-Client Relationship and Privileged Communications," 1965 Washington University Law Quarterly 362.

(57) Ibid.

(58) "Testimonial Privileges and the Student-Counselor Relationship in Secondary Schools," 56 Iowa Law Review 1323 (1971).

(59) Ibid.

(60) Ibid.

(61) Ibid.

(62) Ibid.

(63) "Privileged Communiations: A Case by Case Approach," 23 Maine Law Review 443 (1971).

(64) Michigan Compiled Laws, §338.1751 (Supp. 1973).

(65) Connecticut General Statutes Annotated, §10-154a (Supp. 1973).

(66) Michigan Compiled Laws, §600.2165 (Supp. 1973).